ZASHIN & RICH

Ernst & Young Tower | 950 Main Avenue, 4th Floor | Cleveland, Ohio 44113 | p: 216 696 4441 | f: 216 696 1618 | zrlaw.com

Stephen S. Zashin
OSBA Certified Specialist in
Labor and Employment Law
ssz@zrlaw.com

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VIA ECF AND EMAIL (sullivannysdchambers@nysd.uscourts.gov)
Honorable Richard J. Sullivan
United States District Court, Southern District of New York
40 Foley Square, Courtroom 905
New York, NY 10007

RE: *David Lane Johnson v. National Football League Players Association, et al.*
Case No. 17-cv-05131-RJS

Dear Judge Sullivan:

Regarding Lane Johnson's remaining LMRDA claims, the dispositive questions are: 1) whether the NFLPA produced a complete copy of the Policy on Performance-Enhancing Substances 2015 ("Policy") to Johnson; and 2) whether the NFLPA retaliated against Johnson in violation of the LMRDA. These are fact questions that necessitate discovery.

Concerning the first question, the LMRDA requires the NFLPA to provide Johnson with all written and oral modifications to the Policy. 29 U.S.C. § 414; Dkt. No. 112-3 (U.S. D.O.L. Office of Labor-Management Standards Interpretative Manual) at §§ 110.300, 110.305.[1] The NFLPA relies on the declarations of Heather McPhee and Stephen Saxon to demonstrate it has done so. However, ***neither declaration*** states the production to Johnson is complete. Rather, both state that they only "***believe***" that the NFLPA provided a complete copy of the Policy or that there are no oral agreements. The NFLPA does not address Johnson's argument that the declarations place the credibility of McPhee and Saxon squarely at issue. Johnson is entitled to test their credibility via discovery. *See Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949) (when "the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error"). Importantly, the declarations also fail to address and conflict with evidence demonstrating the NFLPA has failed to provide Johnson the following Policy documents:

1. *The Arbitrator Amendment* -- The NFLPA's counsel previously stated to another federal court that the bargaining parties agreed to a "modification" of the Policy's three to five arbitrator requirement to allow only two arbitrators and suggested the modification could be oral. *See* Dkt. No. 61-3 at 12:6-19:22. That the NFLPA and NFL appointed a third arbitrator ***after*** Johnson's arbitration is immaterial except to confirm that a modification existed at the time of Johnson's arbitration. NFL in-house attorney Kevin Manara also stated, during Johnson's arbitration, "the

[1] "[J]udicial deference applies to the guidelines that the Labor Department's Office of Labor-Management Enforcement has developed and set out in...its Interpretive Manual." *Molina v. Union Independiente Autentica de la AAA*, 555 F. Supp. 2d 284, 288 (D.P.R. 2008)).

bargaining parties agreed on their own to hire two arbitrators, instead of three." Dkt. No. #3-7 at 18:25-19:2; *see also* Dkt. No. 3-7 at 20:12-16 ("we agreed that we would hire two arbitrators"). The declarations from Saxon and McPhee on which the NFLPA relies to support its Motion for Summary Judgment directly contradict prior statements by the NFLPA and the NFL.

2. *The Collection Procedures* -- The NFLPA has never produced the Collection Procedures expressly referenced in the Policy, including the Policy's specimen handling procedures and collection protocols, which the bargaining parties negotiate, review, and approve annually. *See* Dkt. No. 39-1 at 4, 16, 20. Documents, like these, which are referenced and incorporated into the Policy, are part of the collectively bargained agreement and subject to production under LMRDA Section 104. *See* Dkt. No. 112-3 at § 110.300. At no time, has the NFLPA provided any of the Collection Procedures that must exist pursuant to the Policy's express terms.

3. *The Testing Period Amendment* -- This Court determined the NFLPA and the NFL (not Dr. Lombardo) reached "an agreement" regarding the two-year reasonable cause testing period and that the NFLPA has improperly failed to produce that agreement to Johnson. *See* Dkt. No. 125 at 12, 17. Arbitrator Carter also determined the NFL and NFLPA reached such "an agreement." *See* Dkt. No. 39-2 at ¶ 6.15. Yet, the NFLPA calls this agreement "imaginary." Dkt. No. 144 at 3.

4. *The Certified Forensic Toxicologist Amendment ("CFT") to the 2015 Policy* -- The NFLPA continues to reference a letter amending the ***2014 policy*** -- not the 2015 Policy applicable here. The NFLPA suggests the amendment applies going forward but has not explained why the NFL and the NFLPA specifically incorporated the amendment into the 2016 version of the policy and all subsequent versions, but did not include it in the 2015 Policy requested by Johnson.

In short, genuine issues of material fact abound about the scope of the Policy and what the NFLPA has and has not produced to Johnson. Johnson is entitled to discovery to resolve the inconsistencies, contradictions, and unanswered questions above.

Concerning the second question, the NFLPA continues to wish Johnson's LMRDA retaliation/ discipline claim out of his Amended Complaint. However, Johnson clearly alleged: 1) that he exercised his rights under the LMRDA, including his freedom of speech when he publically questioned the NFLPA's poor representation and ineptitude; 2) that the NFLPA retaliated against him; and 3) that the NFLPA's misconduct "constitute[d] discipline or retaliation against Johnson for asserting his rights under the LMRDA." *See* Dkt. No. 39 at ¶¶ 124-25. 287, 314. In a joint letter to the Court, prior to the NFLPA filing its motion to dismiss, Johnson described his ninth cause of action against the NFLPA for violations of the LMRDA as "refusing to provide Johnson a complete copy of the Policy ***and retaliating against him for asserting his rights***, 29 U.S.C. 401 *et seq*." Dkt. No. 85 at 2 (emphasis added).

Despite this emphasized language, the NFLPA never sought the dismissal of Johnson's LMRDA retaliation claim. Hence, neither Johnson nor the Court addressed it as part of the NFLPA's motion to dismiss briefing. Furthermore, the Court's analysis of the NFLPA's retaliation as part of Johnson's duty of fair representation claim is not dispositive of his LMRDA retaliation claim, which requires the application of an entirely different standard that does not depend on the arbitral award. *See Leavey v. Int' Bhd. of Teamsters-Theatrical Teamsters Local Union No. 817*, No. 13-cv-0705, 2015 U.S. Dist. LEXIS 135509, *19-20, 204 L.R.R.M. 3420 (S.D.N.Y. Oct. 5, 2015) (setting forth LMRDA retaliation standard).

The NFLPA admits it did not produce to Johnson what it claims is the complete Policy until October 16, 2018 -- more than two years after Johnson requested it to help him understand his rights when facing discipline from the NFL. Johnson contends that such withholding evidences retaliation by the NFLPA, because Johnson asserted his LMRDA rights, including making critical statements of the NFLPA's understanding and inept administration of the Policy. Without discovery, the NFLPA can continue to avoid explaining why it refused to provide the most basic document (the Policy) to a member in blatant violation of the LMRDA. *See Guillory v. Boll*, No. 9:12-CV-1771, 2013 U.S. Dist. LEXIS 134284, *32-33 (S.D.N.Y. Aug. 29, 2013) (granting 56(d) request for discovery as to causal connection element of retaliation claim).

Since the inception of this case, Johnson has received zero discovery, despite making multiple requests for discovery. *See*, e.g., Dkt. No. 85 at 3; Dkt. No. 93; Dkt. No. 100; Dkt No. 126. Now that the Court has denied the NFLPA's motion to dismiss, Johnson seeks the following facts specific to his LMRDA claims: 1) what Policy amendments, modifications, agreements, etc. existed at the time of Johnson's request; 2) whether the NFLPA produced a complete copy of the Policy now or at the time of Johnson's request; 3) whether the NFLPA concealed the complete Policy terms to retaliate against Johnson; 4) whether the NFLPA otherwise retaliated against Johnson in violation of the LMRDA; and 5) whether the NFLPA now denies the existence of an amendment to the Policy it previously told a federal court existed.

Johnson seeks to obtain this discovery by: written discovery; depositions of McPhee, Saxon, NFLPA employee Todd Flanagan, NFL employee Kevin Manara, Dr. Lombardo, and representatives of the NFLPA and NFL under Civil Rule 30(b)(6); and subpoenas to the NFL, the testing laboratories, and Dr. Lombardo. Each of these discovery sources is likely to have potentially favorable information regarding the scope of the Policy and the NFLPA's retaliation. *See Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980) ("when the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted when he is denied reasonable access to potentially favorable information"); *see also Hellstrom v. United States Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) ("summary judgment should only be granted ***if after discovery***, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. ***The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment.***" (internal citations omitted) (emphasis added). The NFLPA does not refute or respond to its prior statements to this Court that it agreed to discovery if any of Johnson's claims survived its motion to dismiss. *See* Dkt. No. 85 at 4; *see also* Dkt. No. 93 at 1-4.

Finally, the Court already rejected the standing argument the NFLPA recycles from its motion to dismiss. Dkt. No. 125 at 8 (emphasis added). The NFLPA's suggestion that the Court's Memorandum and Order supports its standing argument misrepresents this Court's decision. *Compare* Dkt. No. 144 at 3 (arguing Johnson lacks standing because he cannot tie the NFLPA's violation of the LMRDA to "the arbitral outcome"), *with* Dkt. No. 125 at 8 ("the NFLPA's assertion that Johnson lacks standing to assert his LMRDA claim because he has not shown that the alleged LMRDA violations altered the outcome of the arbitration applies the wrong causation standard to the standing analysis").

Pursuant to the Court's Individual Rule and Practice 2.A., Johnson does not attach a declaration to this submission but will provide one at the Court's direction.

Respectfully submitted,
/s/ Stephen S. Zashin
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